Supreme Court, U.S.
FILED
JUL 12 1991
OFFICE OF THE CLERK

No. 90-1390

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

GENERAL MOTORS CORPORATION,
Petitioner,

v.

EVERT ROMEIN, *et al.*,
Respondents.

FORD MOTOR COMPANY,
Petitioner,

v.

ARTURO GONZALEZ, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of Michigan

BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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July 12, 1991

QUESTION PRESENTED

Amicus will address the following issue:

Whether the 1987 Michigan statute retroactively imposing liability for additional workers' compensation benefits for closed disability periods violates the Impairment of Contracts Clause (Art. I, § 10) of the United States Constitution.

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INTEREST OF THE *AMICUS*

The Washington Legal Foundation ("WLF") is a national nonprofit public interest law center with more

than 120,000 members throughout the United States. WLF seeks to promote and protect the free enterprise system and the economic and civil liberties of individuals and businesses. WLF has long been interested in the promotion of the economic liberties recognized in the United States Constitution, as well as the protection of private contractual rights against improper governmental intrusion.

This brief will bring relevant authorities to the attention of the Court that may not be emphasized or brought to the attention of the Court by the parties or by other *amici curiae*. Among other things, it will explain why the Supreme Court's recent Contract Clause decisions are contrary to both the language and purpose of the Clause. WLF believes an alternative to these analyses is faithful to the language and intent of the Contract Clause and will protect pre-existing contractual expectations. WLF has no other interest in the resolution of this case, political or economic.

STATEMENT

In the interest of brevity, WLF adopts the Statement included in the petitioners' brief.

SUMMARY OF ARGUMENT

The Contract Clause of the United States Constitution flatly prohibits state laws impairing the obligations of contracts. In its recent decisions, this Court has strayed from that straightforward principle. The result has been a "reasonableness" test that fails to give lower courts an intelligible, consistent standard of review. Moreover, it invites policy debates and value judgments that are at odds with the very purpose of the Constitution. The

Court should discard this test and return to its constitutional guidepost.

Consistent with the language and history of the Contract Clause and the Court's own prior interpretations, this Court should read the Contract Clause as an absolute ban on state laws that redistribute resources from one contracting party to another in violation of pre-existing contractual obligations. Under a faithful reading of the Contract Clause, Michigan's workers' compensation statute is clearly unconstitutional since it redistributes resources in violation of settled contractual expectations.

The judgment of the Supreme Court of Michigan should be reversed.

ARGUMENT

I. THE COURT'S RECENT "REASONABLENESS" APPROACH TO THE CONTRACT CLAUSE SHOULD BE ABANDONED.

The Contract Clause of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. CONST. art. I, § 10, cl. 1. Despite this absolute and unconditional language, the Court's recent decisions have engrafted a qualifying reasonableness proviso that nowhere appears in the Clause *per se*. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 502-06 (1987).

Notwithstanding the Clause's unequivocal prohibition, the Court has suggested that a contractual impairment is permissible where state policy goals are more weighty. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-51 (1978) (Court struck down legislation

after assessing the severity of the impairment and the extent of the State's interest in enacting legislation, noting "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear").

The Court's most recent decision restates this "balancing test" formulation. *Keystone Bituminous Coal Ass'n*, 480 U.S. at 502-06. In *Keystone*, the statute in question "operates as 'a substantial impairment of a contractual relationship.'" *Id.* at 504 (citation omitted). Nonetheless, after giving complete deference to the state's policy determination, the Court found that "the impairment of petitioners' right . . . is amply justified by the public purposes served by the Subsidence Act." *Id.* at 506. This apparent willingness to permit impairments of contractual obligations upon a minimal showing of public purpose effectively reads the Contract Clause out of the Constitution. *See generally City of El Paso v. Simmons*, 379 U.S. 497, 517, 521-28 (1965) (Black, J., dissenting) (stating that the Court has "balanc[ed] away the plain guarantee of Art. I, § 10").[1]

Although the Court itself has acknowledged that the Contract Clause was at one time "perhaps the strongest single constitutional check on state legislation," *Allied Structural Steel Co.*, 438 U.S. at 241, only two decisions in the last 40 years have invalidated state laws under the Contract Clause. *Id.* at 234; *United States Trust Co. v. New Jersey*, 431 U.S. at 1. *See Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 744 (7th Cir. 1987) (Posner and Easterbrook, JJ., concurring) ("[b]y exploiting the unfortunate ambiguities that surround the word

[1]Nonetheless, the severity of contractual impairment in this case is such that, even if the Court adheres to its "balancing test" formulation, the Michigan workers' compensation statute cannot withstand constitutional scrutiny.

'reasonable,' the Supreme Court has defanged the contract clause").

A. The Court's Current Balancing Approach Is Unprincipled And Unworkable.

Because this Court has strayed from the language of the Constitution, its holdings do not articulate a coherent approach to the Contract Clause. The resulting decisions have been unpredictable and provide no clear guidance to lower courts. Indeed, the standard itself fluctuates markedly from opinion to opinion. For example, in *United States Trust Co. v. New Jersey*, the Court held that "an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." 431 U.S. at 25. While "reasonableness" suggests a minimal standard of review, the word "necessary" implies something more, without clearly indicating what that might be.

Furthermore, the Court stated that in assessing state laws impairing private contracts, courts should "properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23. This implies *de minimus* judicial review, akin to the "rational basis" test for social and economic legislation under the Due Process Clause of the 14th Amendment. Such a standard further eviscerates the Contract Clause.

In contrast to the lenient approach for private contracts set forth in *United States Trust Co. v. New Jersey*, the Court suggested stricter scrutiny only a year later. *See Allied Structural Steel Co.*, 438 U.S. at 247 ("[y]et there is no showing that this severe disruption of contractual expectations was necessary to meet an important general social problem"); *see also* L. Tribe, *American Constitutional Law* 621 (2d ed. 1988) (characterizing the

"exacting standard of review" applied in *Allied Structural Steel Co.* as "strict scrutiny").

More recently, the Court's "refus[al] to second-guess" the state's judgment involved in *Keystone Bituminous Coal Ass'n*, 480 U.S. at 506, despite the acknowledged existence of a "substantial impairment of a contractual relationship," *id.* at 504, suggests yet another shift. Even where an opinion refers to more specific criteria, *see, e.g., Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413 (1983) (parties contracting in heavily regulated industry); *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 444, 447 (1934) (emergency legislation and temporary nature of relief), the weight given to those criteria has changed repeatedly. *See, e.g., United States Trust Co. v. New Jersey*, 431 U.S. at 22-23 n.19. The upshot is a fluctuating standard of review that is inconsistent with the Contract Clause's language and purpose.

This standard also vests subjective discretion in the judiciary and thereby undermines the legitimacy of judicial review. As Mr. Justice Brennan noted in his dissent in *Allied Structural Steel Co.*, "The necessary consequence of the extreme malleability of these rather vague criteria is to vest judges with broad subjective discretion to protect property interests that happen to appeal to them." 438 U.S. at 261 (footnote omitted).

Yet another flaw in the formulation is its invitation to *ad hoc* policy analysis. Thus, in *Allied Structural Steel Co.*, the majority thought the effect of the impairment was "severe" "in an area where the element of reliance was vital." *Id.* at 246 (Stewart, J.) (joined by Burger, C.J., Powell, Rehnquist & Stevens, JJ.). The dissent claimed that "the Act does not impose 'sudden and unanticipated' burdens," *id.* at 254, and "will impose only minor economic burdens on employers whose pension plans have been adequately funded." *Id.* at 253. (Brennan, J., dissenting) (joined by White & Marshall, JJ.). With regard to the public purpose, the dissenters wrote that the Act "was designed to remedy a serious social problem," *id.* at 252, while the majority stated, "Not only did the Act have an extremely narrow aim, but also its effective life was extremely short." *Id.* at 248 n.21.

Similarly, in *United States Trust Co. v. New Jersey*, the majority indicated that the statute was a "drastic impairment," 431 U.S. at 31 (Blackmun, J.) (joined by Burger, C.J., Rehnquist & Stevens, JJ.), although the dissenters believed the impairment caused only "the most minimal damage on the part of the Authority's bondholders." *Id.* at 41 (Brennan, J., dissenting) (joined by White & Marshall, JJ.). Referring to the purpose of the statute, the dissenters wrote that it responded to "serious and growing environmental, energy, and transportation problems," *id.* at 38, while the majority stated that the "changes [in these problems] . . . were of degree and not of kind." *Id.* at 32.

These policy debates and the current shifting formulation that fosters them undermine the very purpose of a written constitution. To remain the enduring document that the Constitution is, its provisions must have some fixed meaning that transcends the value judgments of the sitting Supreme Court Justices. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. at 16 ("[w]hether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution"). *See generally* Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852-56, 862-63 (1989); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 984-92, 1004

(1987); A. Cox, *The Role of The Supreme Court in American Government*, 108-09 (1976).

B. The Court's "Reasonableness" Test Flies In The Face Of The Text Of The Contract Clause And The Intent Of The Framers.

Neither the text nor the history surrounding the Contract Clause supports the Court's balancing of its guarantees against state power that itself enjoys no special constitutional protection. The language of the Clause makes clear that it was not intended to be conditioned upon "reasonable" exceptions. If the Framers had wanted a balancing approach, they could have limited the scope of the Contract Clause to prohibit only "unreasonable" impairments, just as they barred only "unreasonable searches and seizures" under the Fourth Amendment. Kmiec & McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 Hast. Const. L.Q. 525, 544 (1987). That they did not do so invalidates a narrower interpretation of the Contract Clause.[2]

Likewise, the context of the Contract Clause within Article I, Section 10 belies any suggestion that the Framers intended to permit states to impose "reasonable"

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[2]In other contexts, this Court has found a "reasonableness" limitation in provisions that are otherwise absolute on their face. *See, e.g., National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 687-88 (1978) (Section 1 of Sherman Act prohibits only unreasonable restraints of trade). No similar interpretation is necessary or warranted with respect to the Contract Clause since it already reflects the restrictions on its scope that were intended by the Framers. It only applies to State laws and not federal legislation. Moreover, it only prohibits retroactive impairments. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 259 (1827). A state is entirely free to regulate contract law prospectively. These limitations obviate any need for the balancing test adopted by the Court.

impairments on the obligations of contracts.[3] The placement of the Contract Clause in Article I, Section 10, Clause 1 -- with numerous other absolute prohibitions on state power -- refutes the notion that it alone could be singled out and subjected to "reasonable" exceptions. The distinction between Article I, Section 10, Clause 1 and Article I, Section 10, Clauses 2 and 3 further supports this conclusion. Unlike Clause 1, Clauses 2 and 3 expressly permit states to take certain otherwise prohibited actions if they obtain the consent of Congress.

The limited discussion of the Contract Clause during the ratification process indicates that it was intended to bar retrospective majoritarian interference with parties' settled contractual expectations. Kmiec & McGinnis, *supra* p. 8, at 529-34; L. Tribe, *supra* p. 5, at 613 ("clause was included primarily to protect private contracts from improvident majoritarian impairment").

The Contract Clause was modeled after the Ordinance of the Northwest Territory. *See* B. Wright, *The Contract Clause of the Constitution* 6-8 (1938); Kmiec & McGinnis, *supra* p. 8, at 529-30. The Ordinance provided, in relevant part:

> [A]nd in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or

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[3]While the Court summarily dismissed the importance of context in constitutional interpretation in *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. at 426-27, no sound basis exists for interpreting the Contract Clause without so much as considering the many other provisions of Article I, § 10, with which the Contract Clause is grouped.

engagements, bona fide and without fraud previously formed.

An Ordinance for the Government of the Territory of the United States North-West of the River Ohio, 1 Stat. 51 (1789).

In *The Federalist*, Madison decried "the fluctuating policy which has directed the public councils" and recognized that legislative interference with settled contractual rights was "contrary to the first principles of the social compact and to every principle of sound legislation." *The Federalist No. 44*, at 282 (J. Madison) (C. Rossiter ed. 1961). Indeed, Madison described the Contract Clause, along with the prohibition of bills of attainder and *ex post facto* laws, as a "constitutional bulwark in favor of personal security and private rights." *Id.*

The Framers were no doubt also influenced by the imperative of the rule of law that legislation be general and prospective. The Contract Clause is one of many Constitutional provisions requiring prospectivity and generality, including the prohibitions on taking private property without just compensation and on bills of attainder and *ex post facto* laws.

It is clear that the Framers included the Contract Clause with full recognition of its absolute requirements. Those opposed to the Contract Clause objected precisely because they feared it would prevent the necessary exercise of state power in times of crisis. *See* 2 J. Madison, *The Records of the Federal Convention of 1987* 439-40 (M. Farrand ed. 1911); B. Wright, *supra* p. 9, at 13. Despite these protestations, the Contract Clause was included. In response to those who argued that the Contract Clause was too broad, it was made clear that the Clause prohibited "retrospective interferences only." 2 J.

Madison, *supra*, at 440. *See Ogden v. Saunders*, 25 U.S. (12 Wheat.) at 286 (opinion of Johnson, J.) (stating that the contract clause was intended to guard against "arbitrary and tyrannical legislation over existing rights"). James Madison himself acknowledged that "inconveniences might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it." 2 J. Madison, *supra* p. 10, at 440.

This Court's prior interpretation of the Contract Clause recognized its broad and absolute language and the intent of the Framers. *See, e.g., Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 206 (1819) ("[t]he convention appears to have intended to establish a great principle, that contracts should be inviolable").

By contrast, the current "reasonableness" formulation is at odds with the Framers' clear awareness that certain laws violating contractual rights would seem "proper, & essential" and that the Clause would cause certain "inconveniences." 2 J. Madison, *supra* p. 10, at 440. *See* Scalia, *supra* p. 7, at 856 ("I think it highly probable that over the past two hundred years the Supreme Court, though not avowedly under the banner of 'non-originalist' interpretation, has in fact narrowed the contract clause of the Constitution well short of its original meaning") (footnotes omitted).

II. THE COURT SHOULD RESTORE ITS ORIGINAL INTERPRETATION OF THE CONTRACT CLAUSE AND PROTECT SETTLED CONTRACTUAL EXPECTATIONS.

The Court should restore its original interpretation of the Contract Clause as a ban on all state laws that redis-

tribute resources in violation of existing contractual rights.[4] Such an interpretation is faithful to the actual language of the Constitution and the original understanding of the Framers. In addition, it eliminates the need for a balancing of interests and results in a more principled and predictable Contract Clause jurisprudence.[5]

Some have opposed such an interpretation of the Contract Clause, fearing it might lead to the kind of wholesale judicial invalidation of social and economic legislation that occurred under the now-discredited doctrine of substantive due process. *Cf. United States Trust Co. v. New Jersey*, 431 U.S. at 60-61 (Brennan, J., dissenting). Preliminarily, it should be noted that such a result-oriented argument is itself constitutionally unprincipled. Constitutional obligations cannot be ignored merely because they create a barrier to some legislation, however desirable that legislation may be considered as a matter of public policy. Furthermore, such concerns

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[4]Kmiec & McGinnis, *supra* p. 8, at 525; *see* Note, *A Procedural Approach to the Contract Clause*, 93 Yale L.J. 918 (1984).

[5]Petitioners have proposed an alternative formulation, requiring that "any impairment must be justified by a compelling state interest or, at a minimum, by a showing that it was 'essential to the achievement of an important state purpose.'" Petition For a Writ of Certiorari at 23 (*quoting United States Trust Co. v. New Jersey*, 431 U.S. at 32 (Burger, C.J., concurring)). Judge Posner has also suggested that an impairment may be permissible where there is a "strong need" or an "emergency." *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d at 743. While these approaches mitigate the drawbacks of the Court's current test, they continue to permit subjective value judgments and are still not in keeping with the absolute language of the Contract Clause. In any event, the mere observation that emergency situations and special needs may warrant impairment in exceptional cases in no way justifies this Court's application of a "broad, loose, and forgiving standard of reasonableness," *id.* at 744 (Posner and Easterbrook, JJ., concurring), to an unequivocal provision of the Constitution.

themselves ignore dispositive distinctions between the Contract Clause, grounded as it is in the text of the Constitution, and the amorphous doctrine of substantive due process. *See* Kmiec & McGinnis, *supra* p. 8, at 552-53. Indeed, the uncertainty generated by the Court's current *ad hoc* balancing approach creates far greater risk of unprincipled rejection of economic legislation than would an approach prohibiting retrospective laws.

Neither would an originalist interpretation of the Contract Clause "obliterate the police power of the States." *Allied Structural Steel Co.*, 438 U.S. at 241. Properly construed, the Contract Clause does not jeopardize the State's power to provide for the general welfare. It simply ensures that the State's power is exercised subject to proper constitutional restraints.

Because the Contract Clause is subject to several limitations, *see*, *supra* p. 8 n.2, it provides ample opportunity for the exercise of police power. For example, the Contract Clause does not prohibit a state's exercise of police powers that impose an incidental burden on one party to a contract, provided that the state does not redistribute resources from one contracting party to another in violation of preexisting contractual obligations. Additionally, the Contract Clause presents no bar to federal government activity.

Furthermore, if a state determines that immediate action is truly necessary, it can impair existing contracts if it provides compensation, so that the public at large bears the cost of the impairment. Kmiec & McGinnis, *supra* p. 8, at 554; Note, *supra* p. 12 n.4, at 928-29.

As applied to the facts of this case, the Michigan workers' compensation statute is clearly unconstitutional because it retroactively impairs the parties' contractual

obligations and imposes massive unforeseen financial liability on petitioners without providing compensation.

CONCLUSION

The judgment of the Supreme Court of Michigan should be reversed.

Respectfully submitted,

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